Supreme Court, U.S.
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No. 97-731

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRIS W. BEGGERLY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

In the Government's statement of parties to the proceeding, it omitted James R. Beggerly. The following statement is the same as the Government's with this one addition.

Petitioner is the United States of America. Petitioner was defendant in the district court and appellee in the court of appeals. The respondents, Chris W. Beggerly, James R. Beggerly, Clark M. Beggerly, Velma B. Garner, Suzanne Reed, and David Reed, were plaintiffs in the district court and appellants in the court of appeals.

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13 Charles A. Wright, et al., *Federal Practice & Procedure* § 3523 (2d ed. 1984) 8

STATEMENT OF THE CASE

In 1950, Clark M. Beggerly, Sr. purchased 729 acres of land on Horn Island at a Jackson County, Mississippi tax sale. He purchased this property as a long-term investment for the benefit of his family. (S.J. I,tab 3,pp.1-2; A. I:50-51).[1] After the purchase, the Beggerly family continually paid ad valorem taxes on the property and their ownership was generally known and recognized by the local residents, the county, state and federal government. (S.J. I,tab 3,pp.7-8; A. I:57-58,75).

In 1971, the United States Congress adopted legislation creating the Gulf Islands National Seashore Park. 16 U.S.C. § 459h. The purpose of the park was to protect barrier islands in the Gulf, including Horn, Ship and Petit Bois, from development and to preserve them in their natural state. 16 U.S.C. § 459h.

Within a few months after the act creating the park was adopted, John S. Creighton, a land acquisition officer for the Department of Interior offered the Beggerlys approximately $200.00 per acre for their land which they rejected. (S.J. I,tab 4,p.4; A. I:76-77) Over the next three years, the federal government agents continued to contact

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[1] The record references used in this brief are the same as those used in the briefs filed in the Fifth Circuit Court of Appeals. Record references state the volume as a Roman numeral followed by a colon and then the page number. When reference is made to Record Excerpts in the Appendix, the reference is A. followed by Volume:page number. The documents supporting the Plaintiffs' motion for summary judgment are bound together in two bound sets of documents which are referred to as S.J. I and S.J. II.

the Beggerlys in an effort to buy their land. In 1975, when the Beggerlys were under intense pressure at work and could not muster the time or money to fight the Government, James R. Beggerly ("Raleigh") relented and agreed to accept $200.00 per acre.[2] The parties signed a contract and Raleigh Beggerly waited to receive his check. After waiting several months and making a number of telephone calls, the Beggerlys found out the Government was not going to honor its contract. (S.J. I,tab 3,p.7; A. I:7; S.J. I,tab 4,pp.5-6, A. I:78-79).

For the next four years, the Beggerlys heard nothing from the Government. Then, in September 1979, the Government filed *United States v. Adams*, Civil Action No. S79-0338(R), United States District Court for the Southern District of Mississippi, Southern Division, to quiet title to the Beggerly property and certain other properties on Horn, Ship and Petit Bois Islands. The Government claimed that it had acquired title to Horn, Ship and Petit Bois Islands through the Louisiana Purchase in 1803, and that it had never issued patents on or otherwise conveyed its interest in the properties listed in the complaint. The complaint identified the Beggerlys' property and alleged that their title was not supported by a valid patent. (R. II:Ex. I; A. I:191).

During the pendency of the suit, the Beggerlys, their lawyers and experts made a diligent effort to find a valid patent or grant to support their title. (S.J. I,tab 4,pp.6-7;

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[2] There were two parcels involved, a 620 acre tract owned by Raleigh Beggerly and a 120 acre tract owned by Raleigh and the other family members. The contract to sell applied to the 620 acre parcel only. (R. I:215-216; A. I:11-12).

A. I:79-80; S.J. II,tab 7,pp.2-3; A. I:86-87). Throughout the litigation, the Government represented to the Beggerlys and the court that there was no grant or patent validating the Beggerlys' title. (R. II:Ex. E,p.1). Unable to find a grant or patent, and facing an imminent trial date, the Beggerlys accepted a nominal settlement of approximately $200.00 per acre to cover their litigation costs, time and trouble, but not market value for acquisition of their title. (S.J. I,tab 3,p.10; A. I:60,66). Both the Government and the Beggerlys knew that the market value of the property far exceeded $200.00 per acre. (S.J. II,tab 4,p.4; A. I:88).

Shortly after the Government filed the *Adams* suit to quiet title to "unpatented" properties on Horn, Petit Bois and Ship Islands, a developer began site work on 717 acres on Petit Bois Island, one mile east of the Beggerly property on Horn Island. (S.J. II,tab 7,pp.10-11; A. I:107-08). The Government recognized that the owners of this Petit Bois property had a valid title, but, consistent with the purpose of the park, wanted to prevent development. Therefore, it filed a condemnation suit and took title to the property before any significant development occurred. (R. II:Ex. J; A. I:91). In the Petit Bois condemnation litigation, *United States v. 717.42 Acres*,[3] the district

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[3] *United States v. 717.42 Acres of Land, More or Less Situate in the County of Jackson, State of Mississippi and Petit Bois, Inc., et al.*, Cause No. S80-0450(N), United States District Court for the Southern District of Mississippi; Southern Division. (S.J. II, tab 7, Ex. A; A. I:98).

court rejected the Government's appraisal, which indicated a value of $200.00 per acre, finding that it represented the Government's internal value for park purposes and not fair market value. After valuation hearings, the court awarded $8,500.00 per acre for the surface and $6,000.00 per acre for minerals. (R. II:Ex. K&L; S.J. II,tab 7, Ex. B; A. I:98,117-118,120).

Even though they had lost their title when the judgment was entered in the *Adams* case and had received only a fraction of its value in the settlement ($200 per acre – compared to the Petit Bois just compensation award of $14,500 per acre), the Beggerlys continued their search for a grant or patent. They contacted state, local and federal officials and filed Freedom of Information Act requests. (S.J. I,tab 3,p.10; A. I:60). Ultimately, they became convinced that the most likely source of a grant would be from the Spanish government during the latter part of the Eighteenth Century, when Spain had sovereignty over the area. The Beggerlys employed Edith Axelson, a genealogist in Washington, D.C., to do research in the National Archives. After meticulous review of over seventy-five files, Mrs. Axelson found the Boūdreau Grant in the Civil Records Branch of the National Archives in Washington, D.C. (S.J. I,tab 3,p.11; A. I:61; S.J. I,tab 5,p.2; A. I:126).

The Boudreau Grant is the Government's official record of a Spanish grant made by Bernardo de Galvez, Governor General of Spanish Louisiana, a Knight and Colonel of the Royal Army, to Catarina Boudreau in 1781. Ms. Boudreau, a prominent widow from Pascagoula, met Galvez in Mobile in 1780 after he had won the battle of Mobile and taken it for the Spanish Crown. (S.J. I,tab 6,pp.24-26; A. I:175-177). She later petitioned Governor

Galvez to grant her Horn Island as he had promised to do. He made good on his promise. (S.J. I,tab 6,pp.21-22; A. I:172-173). In 1816, heirs of Ms. Boudreau presented the grant to U.S. Commissioners who recorded it and it has remained continuously in the institutional control and custody of the Government since that time. (S.J. I,tab 6,p.4; A. I:136).

The Beggerlys promptly sent the Grant to the Bureau of Land Management ("BLM") in Washington, D.C. and requested that their title be recognized and patents issued. The Department of Interior personnel, apparently relying upon *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), advised the Beggerlys that they were aware of the Grant but since it had not been confirmed by Congress, it was not valid. (S.J. I,tab 3,Ex. "C"; A. I:67,72-73). BLM assured the Beggerlys that it had thoroughly researched all issues and if they did not agree with this opinion, they could file suit. (S.J. I,tab 3,Ex. C; A. I:73).

The Beggerlys pressed on. They contacted experts at the Mississippi Archives and at archives in New Orleans to find an expert who could evaluate the Boudreau Grant. (S.J. I,tab 4,pp.9-10; A. I:82-83). Their investigation led them to Dr. Hans Baade, a professor of International Law at the University of Texas Law School, and a preeminent scholar on Spanish land grants. They employed Dr. Baade and, after careful study, he wrote an exhaustive thirty page opinion stating that the Grant was a valid, binding and final grant of Horn Island under the Spanish law when made and that its validity was subsequently confirmed by the Treaty of Amity and Settlement between the United States and Spain as interpreted by Chief Justice John Marshall in *United States v. Percheman*, 32 U.S. (7

Pet.) 51 (1833). (S.J. I,tab 6,pp.2-3; A. I:135-136). Therefore, when the Government gained sovereignty over Horn Island in 1803, it did not get title to Horn Island which was granted by the prior sovereign to a private owner in 1781. Title continued in the name of the private owners – the Boudreaus and their successors in interest – the Beggerlys. (S.J. I,tab 6,p.3; A. I:135).

Having no other recourse, the Beggerlys filed their suit on June 1, 1994. (R. I:1; A. I:29). Since the Fifth Circuit Opinion, *Beggerly v. United States*, 114 F.3d 484 (5th Cir. 1997), provides an adequate statement of the course of proceedings in the litigation, we will not restate those developments here; however, it is noteworthy that all of the issues now before the Court were presented to the Fifth Circuit and the litigation ended when not a single member of the Fifth Circuit requested that the court be polled in response to the Government's Petition for Rehearing en banc. (Government's Appendix, 52a) This petition is simply a desperate, last-ditch effort by the Government.

SUMMARY OF THE ARGUMENT

The court below found that the Beggerly family had proved title to 729 acres of land that the federal government had erroneously claimed. While this case presents extraordinary facts, in the end this is simply a title suit, which, like most title suits, turns on the facts uniquely associated with the real estate at issue. The Government makes a game effort to convince the Court that this case presents legal and fact issues of great importance to the

public interest, but in fact that simply is not the case. The Boudreau Grant relates to Horn Island only. It has no bearing on any other islands in the Gulf of Mexico. The *Adams* quiet title suit, through which the Government got title to the Beggerly property, affected only a portion of Horn Island. In fact, it appears that the Beggerlys' 729 acres are approximately one-half of the total acreage in the *Adams* litigation.[4] Therefore, the other claims which could result from the Fifth Circuit ruling are very limited in scope and well defined. There is no factual basis for the Government's representation that the Fifth Circuit ruling may unsettle titles on barrier islands throughout the Gulf of Mexico.

The most important point is that the Fifth Circuit ruling is correct. The Government argues that the Fifth Circuit's ruling that the Boudreau Grant was a valid grant is in conflict with *United States v. Power's Heirs*, 52 U.S. (11 How.) 570 (1851), which the Government did not cite below. A careful review of the *Power's Heirs* opinion reveals that this Court did not have a complete record before it at the time and erroneously assumed that the King of Spain had not vested Governor Galvez with authority to make grants along the Mississippi Gulf Coast until 1783. Historical documents which are now universally accepted as stating the correct facts establish beyond question that Governor Galvez did have authority to

[4] The Beggerlys received a $208,000 settlement in the *Adams* litigation, 114 F.3d at 489; the total settlement for all parcels was $400,000, Government's Appendix at 58a, indicating that the Beggerly acreage was slightly more than half of the total acreage in litigation.

make the Boudreau Grant in 1781; therefore, the Fifth Circuit ruling, which is based on a complete historical record not available to this Court in 1851, is correct.

Each of the Government's arguments is addressed below in the order which the Government presented them.

ARGUMENT

I. The District Court Did Have Ancillary Jurisdiction to Set Aside the Consent Judgment.

In 1979, the Government filed suit in the federal district court in Biloxi, Mississippi, against the Beggerlys to quiet title to the Beggerlys' property. Because of the Government's failure to produce the Boudreau Grant and its repeated representations that no such grant existed, judgment was entered in favor of the Government. Once the Beggerlys found the Boudreau Grant and were able to defend their title, they filed suit in the same district court that entered the judgment against them seeking to have that court set aside its judgment. The general rule of supplemental, or ancillary, jurisdiction is that when the Government sues, the defendant may assert such claims as necessary to fully defend himself. The court's jurisdiction to hear defensive claims arising out of the same controversy is well established. *See* 7 James W. Moore, *Moore's Federal Practice*, ¶ 60.38, at 60-397 to 99 (2d ed. 1995). Without this basis for jurisdiction, a federal court could not do complete justice. 13 Charles A. Wright, et al., *Federal Practice & Procedure* § 3523 (2d ed. 1984).

The Fifth Circuit, citing *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 312 F.2d 702 (5th Cir. 1954) and *Weldon v. United States*, 70 F.3d 1 (2d Cir. 1995) as authority, properly ruled that:

> We have held that an independent action filed in the same court that rendered the original judgment is a continuation of the original action for purposes of subject matter jurisdiction.
>
> . . . .
>
> To allow the government to use sovereign immunity as a shield where it previously has invoked the court's jurisdiction and prevailed based upon its misrepresentations, negligence, or mistake would do unacceptable violence to our basic notions of justice.

114 F.3d at 487.

In addition to the ancillary jurisdiction, the court clearly had jurisdiction under the Quiet Title Act, 28 U.S.C. § 2409a(b), to consider the issues before the court and to ultimately adjudicate title.

II. The Court Correctly Ruled That the Quiet Title Act's Limitation Period is Subject to Equitable Tolling.

During the *Adams* litigation, the Beggerlys, their lawyers and experts made a diligent effort to find a valid patent or grant to support their title. Throughout the litigation, the Government failed to produce that document and affirmatively represented to the court and the

Beggerlys that the document did not exist. The Government, however, possessed the essential evidence necessary for the Beggerlys to prove their title the entire time. After the *Adams* settlement, it took the Beggerlys ten years of continuous searching in archives all over the country before they finally found the document in the Government's possession. The Government now argues that that is too bad, the statute of limitations has run. This is a classic case for equitable tolling.

The Government challenges the district court's finding that the limitations period of the Quiet Title Act was equitably tolled. The Government states that "[t]he question whether the QTA's limitation period is subject to equitable tolling is one of considerable importance to the management of federal lands." The Government, however, provides no justification or explanation for this statement. We fail to see how the Fifth Circuit's application of equitable tolling in this case could have impact on other federal lands unless the Government has followed a general practice of misrepresenting the existence of patents and grants in its acquisition of lands from other private land owners.

The Fifth Circuit's ruling on equitable tolling is correct. As a general rule, the doctrine of equitable tolling is read into most federal statutes of limitations. *Cada v. Baxter HealthCare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991). Equitable tolling is applicable to suits against private defendants as well as suits against the United States. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 92 (1990); *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991). In addition, the propriety of equitable tolling must be determined on a

case-by-case basis. *Million v. Frank*, 47 F.3d 385, 389 (10th Cir. 1995). The statute of limitation in the Quiet Title Act, 28 U.S.C. § 2409a(g), is subject to equitable tolling. *Fadem v. United States*, 52 F.3d 202, 206 (9th Cir. 1995), *vacated*, 117 S. Ct. 1103 (1997), *reinstated*, 113 F.3d 167 (9th Cir. 1997).

In *Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995), the Court of Appeals held that the statute of limitations in the Quiet Title Act was subject to equitable tolling. The Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of its holding in *United States v. Brockamp*, 117 S. Ct. 849 (1997). On remand the Court of Appeals concluded that *Brockamp* did not affect the court's analysis and reinstated its decision. The court stated:

> None of the considerations which led the Court to reject the rebuttable presumption of equitable tolling in *Brockamp* apply to this case. 28 U.S.C. § 2409a(g) is non-technical, non-substantive and comprised of two short sentences:
>
> > Any civil action under this section . . . shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.
>
> Equitable tolling in a quiet title action is a doctrine to be applied by the court to the relatively few quiet title action suits in which it is raised, not by an administrative agency in potentially thousands of cases. Equitable tolling in this case

> is well within the Court's direct *Irwin* precedent.[5]

Fadem, 113 F.3d at 167-68.

The Government asserts that the district court's "holding that the QTA's limitation period is subject to equitable tolling, if left unreviewed, could have serious consequences for the stability of title in federal lands." The Government is attempting to give the impression that this decision will have a national impact, when in reality, the impact will be limited to a portion of Horn Island.

III. The Fifth Circuit Did Have Authority to Reverse the Dismissal of the Summary Judgment and to Direct Entry of Summary Judgment.

The Government filed a motion to dismiss supported by documents, other than the pleadings, which in effect was a summary judgment motion. The Beggerlys filed a summary judgment motion with supporting documents. Therefore, this case came before the Fifth Circuit on cross-summary judgment motions. There were no material facts at issue. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Courts of appeal review a district court's determination on a motion for summary judgment *de novo*. *FTC v. Hospital Bd.*

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[5] *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990).

of Directors, 38 F.3d 1184, 1187 (11th Cir. 1994); *Esmark Apparel, Inc. v. James*, 10 F.3d 1156, 1159 (5th Cir. 1994).

In *Sacred Heart Medical Ctr. v. Sullivan*, 958 F.2d 537 (3d Cir. 1992), the third circuit was faced with an appeal regarding both a denial of summary judgment and an order granting a cross-motion for summary judgment. *Sacred Heart*, 958 F.2d at 543. The court held:

> [w]hen an appeal from a denial of a summary judgment is raised in tandem with an appeal of an order granting a cross-motion for summary judgment, we have jurisdiction to review the propriety of the denial of summary judgment by the district court. In addition, where, as here, the facts are uncontroverted, we are free to enter an order directing summary judgment in favor of the appellant.

Id. (citations omitted); *see McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 253 (10th Cir. 1993). The Third Circuit's position is consistent with authority that states "the reviewing court may direct the entry of summary judgment even though the district court did not act favorably on the motion. The appellate court can either include the order as part of its opinion or remand the case with directions to enter summary judgment." 10 Charles A. Wright, et al., *Federal Practice & Procedure* § 2716 (2d ed. 1983); *see, e.g., Morgan Guar. Trust Co. v. Martin*, 466 F.2d 593, 599-600 (7th Cir. 1972).

The Government recognizes that when the facts are not at issue, it is appropriate to enter summary judgment. See Government's Petition for a Writ of Certiorari at page 27 citing *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 543-544, & n.24 (7th Cir. 1996). It then

states this is manifestly not such a case, though it fails to identify the facts that are at issue. The record clearly establishes that the original quiet title action was lost because the Beggerlys did not have the Boudreau Grant. They produced the Boudreau Grant in support of the subsequent action and they won. The only difference between the original action and the second action was the Boudreau Grant. The only question is whether or not the Boudreau Grant is valid, which is a legal issue.

In addition, the court necessarily had to review the merits of the case in order to determine whether or not this was a proper case for an independent action in equity. At 114 F.3d 487, the Fifth Circuit lists the five elements necessary to prove an independent action and it states that the Beggerlys satisfied all of these elements. The second element is "a good defense to the alleged cause of action on which the judgment is founded." In order to determine whether or not a good defense was available, the court necessarily had to consider the validity of the Boudreau Grant, which it did. After it had considered it, the controlling legal issue was determined and the summary judgment was inevitable.

IV. The Boudreau Grant is Valid and Binding.

Though the Government failed to challenge the authority of Bernardo de Galvez to issue the Boudreau Grant at any time in the courts below, it now, for the first time, argues that Galvez did not have that authority and cites in support of its argument *United States v. Power's Heirs*, 52 U.S. (11 How.) 570 (1851). The Beggerlys' expert witness, Dr. Hans Baade, addressed Galvez' authority to

make this grant in his report at page 7 (citing D. C. Corbitt, "The Administrative System in the Floridas") (A. I:158). It is apparent from reading the *Power's Heirs* decision that this court had an incomplete record before it and erroneously assumed that the King of Spain had not granted Galvez authority to issue grants in Mississippi in 1781. If, in 1851, this court had had the complete historical record now available, the court would have known that Galvez did have the requisite authority to make grants in 1781. There is absolutely no doubt Galvez had authority to make the Boudreau Grant in 1781.

The Government argues that the court of appeals erred in concluding, in reliance on an expert opinion, "that Bernardo de Galvez had authority in August 1781 to grant Horn Island to Catalina Boudreau . . . " "[T]hat conclusion," the Government contends, "is in direct conflict with this Court's determination in *Power's Heirs*, 52 U.S. (11 How.)[570] at 579-580 [1851] that de Galvez lacked legal authority to issue grants to lands east of the Pearl River on August 1, 1781, the very day he is said to have issued the grant to Catalina Boudreau for Horn Island, which is east of the Pearl River."

With respect, that submission is misleading. As this Court stated, *id.* at 577-78:

> By the laws of nations, in all cases of conquest, among civilized countries, having established laws of property, the rule is, that laws, usages, and municipal regulations in force at the time of the conquest remain in force until changed by the new sovereign. And this raises the question of fact, whether the king of Spain had changed the laws of England existing in the province, by

> virtue of which the public domain could be granted to private owners, as early as August 1st, 1781, and in their stead adopted the laws of Spain prevailing in Louisiana; as, if the Spanish king had not done so, his officers had no power to grant. *Having nothing to govern us in ascertaining this fact* but the history of Florida and of its conquest by Spain, it becomes necessary to examine that history, in so far as the same may be judicially noticed, and has any bearing on the claim before us. (Emphasis added.)

After reviewing the diplomatic and military history then available (which included the capture of Mobile by Galvez on March 14, 1780, *id.* at 579), this Court concluded, at the place cited by the Government:

> Nothing is found in these historical details indicating that the Spanish laws had been introduced into Florida, and superseded those of England, and that civil power had been vested in Galvez to grant lands. *As this could only be done directly by the king, all presumptions are opposed to such supposition.* The grant purports to have been made within eighty days after the capitulation of Pensacola; a time, at that day, hardly sufficient to have heard from Spain, after the account of the capitulation reached there, had there been no hostile British fleet intervening to intercept intercourse. But what would seem to be conclusive of the fact is, that Galvez did not assume to grant by any new authority; but did so under his commission as governor of Louisiana; and as this bore date before the conquest, and did not extend to Florida, no such power could be exercised by force of that commission. And not having power to grant merely as a military officer in command, the grant

> could not be made by him, and is void. Nor can we suppose that Galvez made any grant of the date of August 1, 1781, as such assumption would be a reproach on his high standing and intelligence. (Emphasis added.)

Id. at 579-80.

Briefly put, this Court was faced with a question of "fact": Did Galvez have a "commission" from the King of Spain at the time material, authorizing him to act as civil as well as military governor of the Mobile District? Relying on diplomatic and military history within judicial notice in 1851, this Court answered that question of "fact" in the negative. The court of appeals relied on Dr. Baade's report and expertise on the legal history of Spanish North America.[6] Dr. Baade's report, based on published archival evidence now available, establishes beyond doubt that the King had in fact granted Galvez the authority to issue grants in the Mobile area in 1781.

In his Report at page 7 (A. I:158), Professor Baade stated: "The authority of Governor General Galvez to

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[6] Writing in 1985, Judge Morris S. Arnold of the United States Court of Appeals for the Eighth Circuit (himself the leading historian of Spanish Arkansas) referred to the author of respondents' Memorandum on Title to Horn Island as "a law professor who is fast establishing himself as the most eminent of Louisiana's legal historians." Book review, 45 La. L. Rev. 1324, 1326 (1985). Most recently, he has written: "Hans Baade invented colonial Louisiana legal history. Before he started doing research in the eighteenth-century records in New Orleans and elsewhere, virtually no serious historical work involving the judicial and notarial archives of colonial Louisiana had ever been done." Comment, 18 *Cardozo L. Rev.* 585 (1996).

'govern' Mobile was spelled out in a royal Order of February 12, 1781" (citing D. C. Corbitt, "The Administrative System in the Floridas," 1 *Tequesta* [=Journal of the Historical Association of Southern Florida] (No. 2) 41, 42 (August, 1942), where that Order is reproduced in English translation. It reads as follows:

> The King, having considered the great extent acquired by the Province of Louisiana through the conquests that you have made of the English Ports and Settlements on the Mississippi and at Mobile, and having in mind the decorum with which you should be treated as Commander-in-Chief of the Army of Operations at Havana; has been pleased to decree that, for the present, and while you govern Mobile and Louisiana, their administration shall be independent of the Captaincy General of the Island of Cuba, and that Pensacola and its district shall be added to your jurisdiction as soon as they are occupied by the forces of the King, who fully authorizes you to govern and defend them through Substitutes during your absence.

Thus, as of February 12, 1781, Bernardo de Galvez did indeed have authority to "govern" what are now known as the "West Florida Parishes" of Louisiana as well as the Mobile district *in his capacity as Governor of Louisiana*, which had been "exten(ded)" to these lands by acquisition through conquest. In terms of the test laid down by this Court in *Power's Heirs*, *supra*, his "commission" as Governor of Louisiana *did* extend to "Florida" (here, the Mobile District of West Florida), at the time of the grant (August 1, 1781).

Well-documented historical studies as well as Spanish archives now accessible demonstrate that Spanish civil government was established in Mobile immediately after the surrender of the British forces there, that the French-speaking male inhabitants of that district took an oath on March 22, 1780, acknowledging the King of Spain as "notre Legitime Souverain" and themselves as "Bons et fidè les Sujets de Sa Majesté Catholique," and that the English-speaking inhabitants of the District were given eight months to dispose of their goods and to depart from the District with their belongings.[7]

French Louisiana was actually settled from Dauphin Island right next to Horn Island here involved, so that the seeming haste of the "exten(sion)" of Spanish Louisiana to this area appears as a disannexation of lands torn away from French Louisiana less than two decades earlier. Justifiable or not in present-day international law, it was obviously approved by the King of Spain and ratified, in any event, by article 3 of the Treaty of Peace of 1783 which provided that Great Britain was to *cede* East Florida to Spain but that Spain was to "*retain* West Florida." *Power's Heirs* at 579 (emphasis added). Speaking to that

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[7] See, in addition to the sources cited at pp. 7 & 24 of Professor Baade's Memorandum, F. de Borja Medina Rojas, *Jose de Ezpeleta Governador de la Mobila 1780-1781* (1980), especially at 24 with note 28 (Grimarest appointed Civil Commandant of Mobile District); 38 with note 61 (oath of fealty to King of Spain of Francophone male inhabitants of Mobile District, March 22, 1780); and 39-40 with note 62 (oath taken by Anglophone male residents of the District, March 17, 1780). All of these measures were promptly reported to Madrid, and obviously approved by authority.

issue in 1851, this Court did not question the legality of the annexation, but only its basis in Spanish law. We may surmise that the enactment of the "Kearny Code of Laws" by the United States in New Mexico some twenty-one months before the Treaty of Guadalupe Hidalgo was in recent memory at the time.[8]

It remains to add that the decision of this Court in *Power's Heirs* forms part of the corpus of the public land law of the Louisiana Purchase and of subsequent expansion of the United States public domain east of the Mississippi. See most recently *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1169 and 1170 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983), where *Power's Heirs* is quoted for the twin propositions that the Louisiana Land Claims Act "only required persons with 'incomplete title' to file their claims," and that incomplete title exists "when the only evidence of a purported grant of the Spanish governor is a notation in a notary's book." Instead of unsuccessfully challenging the former of these propositions in the courts below, the Government might have urged its novel (or perhaps better, its superannuated) reading of *Power's Heirs* at the appropriate time and in the appropriate forum. The casual manner in which it now casts doubt on all unconfirmed but complete pre-January 20, 1783 Spanish land grants in a tri-State area

[8] The Kearny Code was promulgated on September 22, 1846. The Treaty of Guadalupe Hidalgo was signed on May 30, 1848, and proclaimed on July 4 of that year. See N. M. Stat. Ann. 1978, Ch. 1 (3); 9 Stat. 922.

reflects counsel of desperation rather than concern for historical accuracy and respect for precedent.

CONCLUSION

From the outset, the Government sought to include the Beggerlys' property in the Gulf Islands National Seashore Park. Since the Beggerlys had good title, the Government should have condemned the property and paid just compensation in 1979. Now, almost twenty years later, the Beggerlys have established the validity of their title and the Government is back where it started in the same district court where it filed its quiet title action, and where it would have filed its condemnation suit, with the option of either giving the property back or paying just compensation for it. The Quiet Title Act provides jurisdiction. The Government does not need or deserve further review of this case. The petition should be denied.

Respectfully submitted,

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